

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY HOUSTON,

Defendant-Appellant.

UNPUBLISHED

August 24, 2004

No. 246934

Wayne Circuit Court

LC No. 02-013394-01

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant was charged with felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. Following a jury trial, he was acquitted of the assault charge and convicted of the two weapons offenses. He was later sentenced to one to five years for the felon in possession conviction, to be served consecutively to the mandatory five-year term for felony-firearm. Defendant appeals as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the evidence was insufficient to sustain the verdict.

In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Parshall Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

“Felonious assault is defined as a simple assault aggravated by the use of a weapon.” *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). “The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App

499, 505; 597 NW2d 864 (1999). “A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Adrian Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). Even an unloaded gun constitutes a dangerous weapon for purposes of the felonious assault statute. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998); *Avant, supra*. The charge of felon in possession of a firearm also requires proof that the defendant possessed a firearm. MCL 750.224f; CJ12d 11.38a.

The victim and his girlfriend testified that defendant entered the apartment building, came out carrying a shotgun, and pointed the shotgun at the victim’s head. Such evidence, if believed, was sufficient to prove beyond a reasonable doubt that defendant was in possession of a firearm and used it to commit an assault. *Avant, supra* at 505-506; *People v Perry*, 172 Mich App 609, 622-623; 432 NW2d 377 (1988). Admission of the weapon itself into evidence is not necessary to prove possession. *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984). While defendant contends that the witnesses’ testimony was not credible, that is a matter of weight, not sufficiency, of the evidence. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). Moreover, the issue of witness “credibility is for the jury to decide and we will not resolve credibility issues anew on appeal.” *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

Defendant’s argument that he could not be convicted of felony-firearm where he was acquitted of the underlying felony is without merit. While the jury acquitted defendant of the underlying felonious assault charge, he could still be convicted of felony-firearm under the inconsistent verdict rule. *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983); *People v Lewis*, 415 Mich 443, 452-453; 330 NW2d 16 (1982).

Defendant next contends that he was denied effective assistance of counsel because his attorney did not object to inaccurate and prejudicial information in his presentence report. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel’s performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel’s error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel’s conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff’d* 468 Mich 233 (2003) (citations omitted).]

Defendant complains that the presentence report contains inaccurate information about his performance on parole from federal prison. While that information is in the report and the

record shows that counsel did not object to it, there is nothing in the record to show that the information is inaccurate. Because there are no errors apparent on the record, defendant's argument that he was denied ineffective assistance of trial counsel is without merit. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

Defendant objects to the inclusion of several prior charges and convictions in the criminal history section of the report because defendant was not represented by counsel during those proceedings. The report indicates only that it is "unknown" if defendant was represented by counsel and "silence regarding counsel is not the equivalent of the prima facie proof" that the convictions were obtained without counsel or a proper waiver of counsel. *People v Zinn*, 217 Mich App 340, 343-344; 551 NW2d 704 (1996). Because the record does not show that any prior convictions were obtained in violation of defendant's right to counsel, defendant's argument that he was denied ineffective assistance of trial counsel is without merit. *Pratt, supra*.

Defendant's argument that the agent's description of the offense is inaccurate is without merit. The description of the nature of the offense and the resulting charges is supported by the record. The fact that defendant was not ultimately convicted of felonious assault does not mean that the charge was baseless, but only that the jury found that the charge was not proved beyond a reasonable doubt.

Defendant lastly contends that the trial court erred in scoring offense variable 1, aggravated use of a weapon, MCL 777.31, because he was acquitted of felonious assault. "Sentencing issues are reviewed by this Court for an abuse of discretion by the trial court." *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001).

Defendant was assessed fifteen points for OV 1, indicating that a firearm was pointed at or toward a victim. MCL 777.31(1)(b). The scoring of the guidelines need not be consistent with the jury's verdict. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). While the jury may have found that an assault was not proved beyond a reasonable doubt, the sentencing court need only determine that it was proved by a preponderance of the evidence for sentencing. The trial court's determination that defendant pointed a weapon at the victim was amply supported by the victim's testimony. Therefore, the trial court did not err in scoring OV 1. *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly